IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR

FRIDAY, THE 29TH JUNE 2007 / 8TH ASHADHA 1929

WP(C).No. 12189 of 2007(A)

PETITIONER:
---

1. STATE OF SIKKIM,
REPRESENTED BY DIRECTOR OF LOTTERIES,
SIKKIM STATE LOTTERIES, GOVERNMENT OF SIKKIM.

2. A.JOHN KENNEDY,
(PROPRIETOR) MEGHA DISTRIBUTOR,
OFFICE AT 15/650, KUNNATHUR MEDU,
COIMBATORE MAIN ROAD, PALAKKAD.

BY ADV. SMT.NALINI CHITAMBARAM (SR.)
SRI.A.KUMAR

RESPONDENTS:
---

1. STATE OF KERALA,
REPRESENTED BY ITS CHIEF SECRETARY,
GOVT OF KERALA, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM.

2. SECRETARY, TAXES (H) DEPARTMENT,
GOVT OF KERALA, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM.

3. COMMISSIONER OF COMMERCIAL TAXES,
COMMERCIAL TAXES DEPARTMENT,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

4. THE DIRECTOR, KERALA STATE LOTTERIES,
GOVT OF KERALA,
THIRUVANANTHAPURAM.

5. THE DEPUTY COMMISSIONER,
COMMERCIAL TAXES DEPARTMENT,
PALAKKAD.

6. THE ASSISTANT COMMISSIONER (ASSESSMENT),
COMMERCIAL TAXES, SPECIAL CIRCLE, PALAKKAD.

BY ADV. DR.DEVIPRASAD PAL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 29/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONERS' EXHIBITS:

P1: TRUE COPY OF JUDGMENT OF THE HIGH COURT OF BOMBAY PASSED IN W.P. NO.129/2001 DT.30.3.2001.

P2: TRUE COPY OF THE REGISTRATION CERTIFICATE DT.7.7.2005.

P2A: TRUE COPY OF THE CERTIFICATE ISSUED ON RENEWAL DT.3.4.2007.

P3: SUMMARY STATEMENT OF PROOF OF PAYMENT OF TAX FOR THE PERIODS FROM 16.5.2005 TO 30.4.2007.

P4: TRUE COPY OF THE NOTICE DT.27.10.2006.

P5: TRUE COPY OF THE JUDGMENT DT.10.1.2007 IN WPC NO.30355/06.

P6: TRUE COPY OF THE WA NO.101/2007 (WITHOUT EXTS./ANNEXURES) DT.12.1.2007.

P7: TRUE COPY OF JUDGMENT DT.30.3.2007 IN W.A. NO.101/2007 & W.A. NO.256/2007 PASSED BY THE HON'BLE DIVISION BENCH OF KERALA HIGH COURT.

P8: TRUEC OPY OF KERALA FINANCE BILL (NO.2) 2007.

P9: TRUE COPY OF THE DEMAND NOTICE DT.17.3.2007 OF R4.

P10: TRUE COPY OF LETTER DT.28.3.2007 OF THE PETITIONER TO R4.

P11: TRUE COPY OF CERTIFICATE DT.28.3.2007 ISSUED BY R4 TO THE PETITIONER EVIDENCING RECEIPT OF PAYMENT.

TRUE COPY

P.A. TO JUDGE

C.N.RAMACHANDRAN NAIR, J.

.....

W.P.(C) No.12189 of 2007

.....

Dated this the 29th day of June, 2007.

JUDGMENT

This Writ Petition is filed challenging the constitutional validity of the Kerala Tax on Paper Lotteries Act, 2005 (hereinafter called "the Act"). While the first petitioner is the State of Sikkim, second petitioner is the distributor of paper lotteries appointed by the first petitioner for marketing lottery tickets in Kerala. The Act which came into force in April 2005 provided for levy of tax on paper lotteries at the rate of Rs.10 lakhs for every "Bumper draw" and at the rate of Rs.2.5 lakhs for any "other draw". The tax for "other draw" is increased from Rs.2.5 lakhs to Rs.5 lakhs per draw by Finance Act 2007 with effect from 1.4.2007. The second petitioner is registered under the Act as the "Promoter" of the first petitioner's paper lottery in Kerala and is remitting tax for every draw at the rate prescribed under Section 6 of the Act. Even though tax was paid without dispute for two years i.e. 2005-2006 and 2006-2007, petitioners have now filed this W.P. challenging the constitutional validity of the statute on account of the increase in rate of tax for "other draws" effected during this financial year.

2. I have heard Senior counsel Mrs.Nalini Chitambaram

appearing for the petitioners and Senior Counsel Dr.Deviprasad Pal appearing for State of Kerala and other respondents. The main ground of challenge is that the State legislature lacks legislative competence to make any law on lotteries. The petitioners have referred to item 40 of List I of the 7th Schedule to the Constitution of India which authorises legislation on "lotteries organised by the Government of India or the Government of a State". According to the petitioners, in exercise of powers under entry 40, Parliament has made the Lotteries (Regulation) Act 1998 which does not provide for any tax on lotteries including paper lotteries. Since the subject is covered by Central legislation, State has no legislative competence to levy tax on paper lotteries is the case of the petitioners. On the other hand it is contended on behalf of State of Kerala that lottery answers the description of "gambling" contained in entry 62 of the State List to 7th Schedule of the Constitution which provides for "Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling" and therefore tax on paper lotteries is a State-subject. Though law to regulate lottery business is covered by Parliamentary legislation, taxation of lottery under "gambling" is the exclusive subject reserved for the State and therefore, the Act is a perfectly valid piece of legislation is the argument of the State.

3. Another ground of challenge raised in the W.P. is on the validity of Section 6 of the Act for the reason that levy of tax is on the "draw" taking place outside State which is beyond the territorial jurisdiction of the State.

Besides this, the petitioners have also contended that provisions of the Act on incidence of tax are vague and incapable of implementation. It is also contended that levy of tax in advance of the draw is also unauthorised. The last contention raised is that the extent of tax demanded is excessive and confiscatory in nature and is therefore a colourable legislation brought out to stop sale of outside State lottery tickets.

4. So far as the main contention is concerned, that is, lack of legislative competence for the State to levy tax on lotteries, I do not think any discussion by this court is called for because it is a settled position by virtue of decision of the Supreme Court in M/S.B.R.ENTERPRISES V. STATE OF U.P. (AIR 1999 SC 1867) that lottery is "gambling". The Supreme Court specifically referred to State lotteries and described it also as gambling in the following words.

> "As we have already recorded, the difference between gambling and trade is that gambling inherently contains a chance with no skill, while trade contains skill with no chance. What makes lottery pernicious is its gambling nature. Can it be said that in the State-organised lotteries this element of gambling is excluded? There could possibly be no two opinions that even in the State lotteries the same element of chance remains with no skill. It remains within the boundaries of gambling."

Therefore, obviously tax on lottery is covered by entry 62 of the State List to the 7th Schedule to the Constitution. The next question to be considered is whether Entry 40 of the Union List in 7th Schedule stands in the way of State legislation for tax on lotteries. Senior Counsel appearing for the State

has referred to the decision in STATE OF W.B. V. KESORAM INDUSTRIES LTD. (2004) 10 SCC 201, where the Supreme Court has held that power to taxation is different from power to make legislation in the form of regulation. It is specifically held by the Supreme Court in the said decision that even though taxation may be adopted as a method for regulation, the power to tax is not incidental to legislation by way of regulation. Contrary to this, petitioners have relied on Ext.P1 judgment of the Bombay High Court wherein the Bombay High Court has struck down levy of sales tax on lottery based on draw. The decision of the Bombay High Court is not applicable to the facts of this case because what the court has considered therein is levy of tax on lottery as "sale of goods". Incidentally, the court held that draw of lottery cannot be treated as sale of goods for the purpose of taxation. However, in this case it is to be seen that what is taxed is draw of lottery under law made in exercise of statutory power left on the legislature under entry 62 of the State List which specifically authorises levy of tax among other things on "gambling". Going by the abovereferred decision of the Supreme Court in Kesoram Industries case it is clear that the Constitution does not bar State from making law on taxation in respect of the same subject which is reserved for Parliament for regulatory legislation. In the circumstances, the contention of the petitioners that the power of taxation on lottery is vested in Parliament through entry 40 of the Union List, is not tenable. I uphold the

contention of the State that impugned Act is a valid piece of legislation enacted in exercise of authority conferred on the State under entry 62 of the State List.

5. The next contention raised is with regard to extra territorial operation of the statute. This contention has to be considered with reference to statutory provisions namely, the definition clauses and the relevant charging Sections. For easy reference relevant definition clause Section 2(l), and charging Sections 6 and 7 of the Act are extracted hereunder:

> S.2(l) "Promoter" means the Government of India or Government of a State or a Union Territory or any Country who had entered into a bi-lateral agreement or a treaty with the Government of India for organizing, conducting or promoting a lottery and includes, any person appointed for selling lottery tickets by the Government in the State of Kerala on it behalf, where such Government is not directly selling lottery tickets in the State."
>
> S.6 "Levy of tax:-
>
> (1) There shall be levied and collected a tax on paper lotteries at the following rates, namely:-
>
> (a) Ten lakh rupees for every bumper draw; and
> (b) Two lakh fifty thousand rupees in respect of any other draw,
>
> (2) Tax levied under sub-section (1) shall be paid by each promoter.
>
> (3) Where the Government of India or a Government of a State or Union Territory or a Country appoints more than one promoters in the State, one such promoter duly authorised by

the respective Government or Country shall pay tax levied under sub section(1)."

S.7 "Registration of Promoters:-

(1) Every promoter selling lottery tickets shall get himself registered under this Act in such manner and on payment of such fees and security within such period as may be prescribed:

Provided that a person ordinarily selling lottery tickets in retail shall not be liable to get himself registered.

(2) The registration may be renewed from year to year on payment of the prescribed fees and security, until it is cancelled;

(3) Unless the registration is cancelled or renewed, at the expiry of the period of registration, the security may be refunded or released to the promoter after adjusting any or all amount due from him, under this Act."

On going through the above provisions of the Act it is clear that Section 6 is not the sole depository of charging provisions as claimed by the petitioners. The activity that attracts tax is the conduct of lotteries which involves sale of lottery tickets prior to the draw. Under the definition clause of "Promoter" a person selling lottery tickets in the State of Kerala is a promoter. It is the promoter who is liable to pay tax under Section 6(2) of the Act. Section 7 provides for registration of the promoter on payment of fees and on remittance of security to the extent prescribed. Therefore, the levy of tax is not merely on the draw of the ticket which of course takes place outside the State. On the other hand, it is only a measure for levy of tax and what attracts tax under the above charging provisions read with the

definition clause is the activity of conduct of lotteries most important part of which namely, marketing tickets by which the right to participate in the draw is sold to purchasers of tickets, takes place in Kerala. Moreover, though draw is taken outside State, result is published and prize distributed in Kerala. Therefore, the contention of the petitioners that the levy of tax is on the draw which takes place outside the territorial jurisdiction of the State is not correct. Even though the measure of tax is based on draw that takes place outside the State, the activity that attracts tax is the conduct of lottery which as explained above essentially takes place in the State. Therefore, I am of the view that the Act has no extraterritorial operation. This contention is therefore rejected.

6. The next point argued is that the statute is vague and incapable of enforceability. The second petitioner by taking registration as promoter within the State and by paying tax for two years proved beyond doubt that the statute is free from any vagueness as alleged. Even without requirement of any proceedings issued by any authority under the Act, second petitioner has admittedly remitted above Rs.50 crores in the course of last two years for all the draws conducted by the first petitioner. Therefore, the allegation of vagueness against the statute is only to be rejected and I do so.

7. Another contention raised by the petitioners is that the tax is levied in advance of the incidence of levy i.e. draw of the lottery. As already held, draw is only the method for selecting the winner of the lottery. However,

prior to the draw tickets are extensively sold to purchasers who are the participants in the draw. Draw is the ultimate culmination of the gambling activity in lottery. What is taxed is the gambling activity which starts with printing and distribution of tickets and ends up with the draw, declaration of result and payment of the prize money. So long as the levy of tax is properly authorised by the Act, it makes no difference at what stage tax is levied. The provisions pertaining to stage of levy, collection and recovery are generally made taking into account possible evasion. Collection of tax in advance of the draw probably helps to prevent possible evasion of tax after the draw because the party can leave the State after conclusion of sale of ticket in the State. Therefore, the provision for advance collection of tax does not affect the validity of the Act. Petitioners have no case that at any time a draw for which tax is paid was cancelled. Therefore, their apprehension that taxable event may not take place for tax paid draws is out of place and is therefore rejected.

8. The next contention raised by petitioners is that the impugned Act is a colourable legislation to levy tax on sale of lottery tickets. The petitioner has referred to the decision of the Supreme Court in SUNRISE ASSOCIATES V. GOVT. OF NCT OF DELHI (2006)5 SCC 603 wherein the Supreme Court held that lottery cannot be assessed to sales tax as the transaction does not involve sale of goods. According to the petitioners, the impugned Act levies a virtual tax on sale of lottery tickets. However,

respondents contended that sale of tickets or sales turnover have nothing to do with the Act and the measure of tax is solely based on every draw irrespective of as to what is the sales turnover achieved for the sale of ticket. I do not think impugned Act is colourable legislation in as much as it levies tax on every draw of lottery at specific rate per draw and is not related to sale of lottery tickets.

9. The petitioners have raised allegation of discrimination and arbitrariness in the legislation, particularly with regard to increase of rate of tax from Rs.2.5 lakhs to Rs.5 lakhs per draw in respect of every draw other than bumper draw. This allegation is controverted by the respondents by furnishing details of tax payments made by the Kerala State Lottery Department for each draw of the lottery conducted by them. The petitioners are not disputing the factual position with regard to payment of tax and compliance of the statutory provisions by the State Lottery Department in Kerala. So much so, the allegation of discrimination is unacceptable. So far as the allegation of confiscatory nature of levy is concerned, I do not think there is much scope for this court to examine whether the measure of tax is low or high or what it should be. The petitioners are engaged in extensive marketing of lottery tickets in the State and probably Kerala is their largest market because petitioners themselves admitted that they have around 35000 outlets in the State. From April 2005 to April 2007 i.e. in the course of two years, petitioners have admittedly

paid above Rs.59 crores towards tax on paper lotteries in the State of Kerala alone. Obviously business is viable for them and that is why business is continued in Kerala. Even now petitioners and other State Governments and the Kerala State Lottery Department are remitting tax in terms of the revised rate without any difficulty. It is obvious from the business carried on by others similarly placed like the petitioners that the revised rate of tax at Rs.5 lakhs per draw is quite acceptable to them. Therefore, I am unable to accept the argument that the increase of tax is an indirect way of stoppage of lottery business by other States in Kerala. This argument is also therefore rejected.

10. The last ground raised by the petitioners is that the State cannot make any law on lotteries of other States and it's executive power under Article 298 of the Constitution is not extended beyond the territorial jurisdiction of the State. As already stated above, the tax on lotteries is the tax on gambling and is no way regulatory in nature and no way interfering with or regulating right of another State to carry on business on lottery. The petitioners have also no case that they are subject to any regulation or control except in regard to levy and recovery of tax in accordance with the Act which applies to all State lotteries including the lottery run by the State Lottery Department of Kerala equally. Since the Supreme Court held that State lottery is also gambling and since State-gambling is not exempted from the scope of levy of tax under Entry 62 of Second List of the Seventh

Schedule to the Constitution, State law can authorise tax on State-lottery also.

In view of the above findings the W.P. is dismissed.

C.N.RAMACHANDRAN NAIR
Judge

pms